IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1556

BRENDAN T. BYRNE, *et al.*,

Appellants,

v.

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, *et al.*,

Appellees.

No. 78-1553

JAMES P. BEGGANS, JR.,

Appellant,

v.

PUBLIC FUNDS FOR PUBLIC SCHOOLS OF NEW JERSEY, *et al.*,

Appellees.

Appeal from the United States Court of Appeals for the Third Circuit

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

The appellees move the Court to dismiss this appeal or, in the alternative, to affirm the judgment below on the grounds that the appeal does not present a substantial Federal question and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Question Presented

Does a statute providing an exemption or deduction in a state income tax law for tuition payments to religious elementary and secondary schools violate the Establishment Clause of the First Amendment to the Constitution of the United States?

Statute Involved

The appeal concerns the constitutionality of a provision in the New Jersey Gross Income Tax Act, N.J.S.A. 54 A:1-1, *et seq.*, specifically, N.J.S.A. 54 A:3-1(b)(2), which provides as follows:

> "Additional exemptions. In addition to the personal exemptions allowed in (a), the following additional personal exemptions shall be allowed as a deduction from gross income:
>
> ". . . 2. For each dependent who qualifies as a dependent of the taxpayer during the taxable year for Federal income tax purposes—$1,000 plus, for each dependent child attending on a full-time basis an elementary or secondary educational institution not deriving its primary support from public monies—$1,000."

Statement of the Case

The United States District Court for the District of New Jersey, in an opinion dated February 1, 1978, found N.J.S.A. 54 A:3-1(b)(2) unconstitutional as violative of the Establishment Clause and ordered the following language severed from that provision:

> ". . . plus, for each dependent child attending on a full-time basis an elementary or secondary educational institution not deriving its support from public monies—§1,000."

The New Jersey Director of Taxation was enjoined from permitting any taxpayer to take the income tax exemption held unconstitutional for tax years ending in 1977 and in successive years. *Public Funds for Public Schools of New Jersey* v. *Byrne*, 444 F. Supp. 1228, 1232 (D. N.J. 1978).

On appeal, the United States Court of Appeals for the Third Circuit affirmed. It held the provision unconstitutional in violation of the First Amendment on the sole ground that it had the "primary effect of advancing religion."

Having reached that decision, the Court of Appeals did not consider or decide whether the challenged statute was also unconstitutional, as adjudged by the District Court, for failure to avoid excessive governmental entanglement with religion.

ARGUMENT

The decision of the Court of Appeals is in accord with the relevant decisions of this Court.

The District Court adjudged the challenged statute violative of the Establishment Clause in that its effect was to advance religion. The Court of Appeals unanimously agreed. Justice Weis concurred, recognizing that *Committee for Public Education and Religious Liberty* v. *Ny-*

quist, 413 U.S. 756, 790-791 (1973), permitted no other conclusion (see also, *Grit* v. *Wolman,* 413 U.S. 901 [1975], affirming *Kosydar* v. *Wolman,* 353 F. Supp. 744). His concurrence was a reluctant one, since he believed that *Nyquist* was decided erroneously.

The appellants herein place their major, if not sole, reliance upon *Walz* v. *Tax Commission,* 397 U.S. 664 (1970). If they are correct in their assumption that *Nyquist* and *Walz* are incompatible, then it is *Nyquist* which must prevail, since it is the later determination.

In *Walz,* this Court upheld the validity of exempting houses of worships from state real estate tax laws. From this, appellants infer that contributions to churches are constitutionally deductible in computing income for income tax purposes. The next step is to assert the same conclusion in respect to contributions to church schools. The final step is the equation of contributions and tuition payments.

As was noted in the courts below, this argument was asserted, thoroughly considered and rejected by this Court in *Nyquist.* We need emphasize here only that *Walz* can go no further than to sanction contributions to church schools in any provision for deductibility of contributions to charitable institutions. What this means is that, were New Jersey's income tax law to provide a deduction for contributions to charities, it would be constitutional to encompass therein contributions to churches and perhaps even church schools. But nothing in *Walz* can be construed as permitting the deduction of sums paid to church schools not as

unilateral contributions but as bilateral tuition for instruction in those schools.

In *Nyquist,* this Court could not see any basic difference between tuition reimbursements (which it held unconstitutional in the same decision) and tax credits or deductions. Both types had the effect of advancing religion, whether the tuition grant or the credit or deduction covered all or only part of the tuition. Both, said the Court, were equally unconstitutional.

In its opinion, this Court said (413 U.S. at 790-1):

> "In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under §2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hay's dissenting statement below that '(i)n both instances the money involved represents a charge made upon the state for the purpose of religious education.' 350 F. Supp., at 675."

There is, we submit, certainly no more of a difference than that between the tax benefit invalidated in *Nyquist* and the one involved in the present case, a conclusion reached without dissent by both the District Court and the Court of Appeals in this case.

Conclusion

The appeal should be dismissed or the judgment below affirmed.

Respectfully submitted,

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May, 1979

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